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No. 92-1315

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOE B. SHANER AND CYNTHIA K. SHANER, PETITIONERS

v.

UNITED STATES OF AMERICA AND
DOUGLAS G. DIETRICH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether regulations of the Farmers Home Administration gave petitioners a clearly established property interest in obtaining an emergency loan from that agency.

2. Whether petitioners had a clearly established constitutional right to obtain notice of the administrative appeal process provided by the Farmers Home Administration.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 976 F.2d 990. The opinion of the district court (Pet. App. 11a-52a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1992. A petition for rehearing was denied on November 4, 1992. Pet. App. 9a-10a. The petition for a writ of certiorari was filed on February 2, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners applied to the Farmers Home Administration (FmHA) for an emergency loan, but they did not receive one. Contending that their loan application had been negligently processed, petitioners sued the United States, the FmHA, and two FmHA employees to recover damages under Ohio common law, the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), and the Fifth Amendment's Due Process Clause. The district court dismissed petitioners' claims. Pet. App. 11a-52a. The court of appeals affirmed. *Id.* at 1a-8a.

1. In January 1982, after a natural disaster struck Ohio, petitioners, who owned a farm in that State, applied to the FmHA for an emergency loan. Petitioners' application was denied because their cash flow was insufficient to make the required monthly payments, and they were unable to refinance existing loans. In May 1982, petitioners met with Douglas Dietrich, the FmHA supervisor for their county. After that meeting, Dietrich issued a certificate of approval for the loan, but required that the loan be secured by a first lien on petitioners' 1982 crops. Pet. App. 1a-2a.

In July 1982, Dietrich informed petitioners of his intention to cancel the loan. The cancellation notice cited, among other things, petitioners' failure to secure a first lien. In August 1982, petitioners filed for bankruptcy, and Dietrich cancelled the loan. He later denied petitioners' request for reconsideration. Pet. App. 2a, 16a.

As required by FmHA regulations, 7 C.F.R. 1900.56(a)(4),[1] Dietrich gave petitioners a complete statement of their administrative appeal rights in connection with the original January 1982 denial of the loan application. Dietrich did not provide such a statement in connection with his July 1982 action, however. Pet. App. 7a.

Although petitioners did not file a timely appeal, they were granted an appeal hearing before an FmHA hearing officer, Wayne C. Mattingly, on April 26, 1983. On May 5, 1983, the hearing officer upheld Dietrich's decision. In a subsequent appeal decided May 25, 1983, FmHA's acting state director reinstated petitioners' loan application because Ohio law would have given the FmHA priority as to petitioners' 1982 crops; a first lien was thus unnecessary. At that point, however, petitioners could not pursue their loan application because they were in bankruptcy and could no longer qualify for a loan. Pet. App. 3a, 17a.

2. Petitioners filed suit in federal district court against Dietrich, Mattingly, the FmHA, and the United States.[2] Petitioners claimed that Dietrich's mistakes in requiring a first lien (a requirement that the FmHA subsequently agreed was unnecessary) and in not giving them the required notice of their appeal rights amounted to negligence for which they could recover under Ohio common law and the FTCA. They further claimed that they had been deprived of property interests—the emergency loan and access to

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[1] All references are to the FmHA's 1982 regulations.

[2] Mattingly later was dismissed as a party. Pet. App. 13a n.1.

the FmHA's administrative appeal process—without due process in violation of the Fifth Amendment. Pet. App. 6a, 18a.

The district court dismissed petitioners' claims.[3] The court rejected petitioners' constitutional claims because petitioners "failed to plead the existence of a constitutionally protected property interest." Pet. App. 51a. The court stated: "While the various statutory and regulatory provisions relied upon by [petitioners] entitle them to apply for FmHA loans and establish a regulatory procedure for processing and reviewing loan applications, these provisions do not transform [petitioners'] unilateral hope, desire, or need for a FmHA loan into a legitimate claim of entitlement to the loan itself." *Ibid.*

3. The court of appeals affirmed. As to petitioners' due process claim against the United States, the court concluded that the United States was immune from that money damages suit. Pet. App. 6a. As to the due process claim against Dietrich, the court held that petitioners' claimed interest in obtaining an emergency loan was "too speculative to be considered a property right" given the FmHA's "broad discretion in determining whether to approve an application." *Id.* at 7a. The court also rejected petitioners' assertion that they had a constitutional right to notice

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[3] The court determined that Dietrich was immune from tort liability, Pet. App. 25a-28a, 29a-30a, that the FmHA was immune, *id.* at 30a-32a, and that the United States was not liable under the FTCA because the applicable Ohio tort law precluded recovery, *id.* at 36a-50a. Petitioners renewed their FTCA claim in the court of appeals; the court of appeals affirmed. Pet. App. 3a-6a. In this Court, petitioners raise only constitutional claims.

of their appeal rights. *Id.* at 7a-8a. Moreover, the court reasoned that even if petitioners had a right to "information regarding administrative appeals," they had not shown "that Dietrich was grossly negligent in failing to provide the information"—as required by *Daniels* v. *Williams*, 474 U.S. 327, 328 (1986), for a due process suit. Pet. App. 8a. The court pointed out that petitioners "failed to even allege gross negligence[,] [n]or [did] the record contain any evidence that would support such an allegation." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. Petitioners contend (Pet. 13-24) that an applicant for government benefits can have a Fifth Amendment property interest in the benefits. The courts below did not address that issue and, for two reasons, this case does not raise it.

a. First, contrary to petitioners' assertion (Pet. 15), the court of appeals did not adopt a "blanket rule" that an applicant for government benefits has no property interest until the benefits are actually received. The court of appeals held that, even assuming that an applicant for government benefits can have a property interest in the benefits under the Due Process Clause, the FmHA regulations at issue here do not create such an interest. See Pet. App. 7a. That holding is correct.

To claim a constitutionally protected interest under the Due Process Clause, petitioners must make a threshold showing that, under the 1982 FmHA

regulations, they were entitled to receive a loan if their loan application met certain conditions—that is, that the FmHA regulations use mandatory language requiring that a loan be awarded if a loan application meets certain conditions. See, *e.g.*, *Bishop* v. *Wood*, 426 U.S. 341, 344-346 (1976); *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972).

The two provisions of the FmHA regulations on which petitioners rely (Pet. 18 n.4) do not meet that standard. One of them, 7 C.F.R. 1945.51(a), simply announces the agency's non-discrimination policy: "FmHA's policy is to make loans to any otherwise qualified applicant without regard to race, color, religion, sex, national origin, marital status, age, or physical/mental handicap (provided the applicant can execute a legal contract)." And the other, 7 C.F.R. 1945.62, lists "eligibility requirements," stating that "[t]o be eligible for EM loan assistance, applicants must meet [certain] requirements." Those provisions of the regulations do not state that applicants *must* be given a loan if they meet the requirements; rather, applicants are only "eligible" for a loan if they meet the requirements. Therefore, "the various statutory and regulatory provisions relied upon by [petitioners] * * * do not transform [petitioners'] unilateral hope, desire, or need for a FmHA loan into a legitimate claim of entitlement to the loan itself." Pet. App. 51a. Petitioners' interest in obtaining a loan was "too speculative to be considered a property right." *Id.* at 7a.[4]

[4] Petitioners have cited no case holding that the FmHA regulations on which they rely create a constitutionally protected interest in prospective benefits. The cases which

Because the FmHA regulations do not give petitioners a constitutionally protected interest in an emergency loan, the underlying issue petitioners want this Court to address—whether an applicant for government benefits can have a Fifth Amendment property interest in the benefits—is not presented by this case.

b. Moreover, even assuming that an applicant for government benefits can have a property interest in the benefits under the Due Process Clause, petitioners' suit cannot succeed because such a right was not clearly established at the time of Dietrich's action in this case.

Petitioners seek damages from the United States and Dietrich[5] for their alleged failure to provide due process in depriving petitioners of their property. Pet. App. 6a. As the courts below correctly held, and as petitioners apparently concede, petitioners cannot maintain their due process claim against the United States because the United States is immune from suit for money damages for an alleged violation of the Due Process Clause of the Fifth Amendment. See *United States* v. *Testan*, 424 U.S. 392, 400-402 (1976); see also *United States* v. *Mitchell*, 463 U.S. 206, 216-217 (1983); *Clark* v. *Library of Congress*, 750 F.2d 89,

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petitioners cite (Pet. 17) involve statutory or regulatory provisions where an agency *must* award a specific benefit to an applicant who meets specified eligibility criteria, such as a certain income or physical condition. In those cases, the broader question raised by petitioners—whether an applicant for government benefits can ever have a property interest in those benefits—would thus become an issue.

[5] Petitioners also sought damages from the FmHA, but they do not renew that claim in this Court.

103 n.31 (D.C. Cir. 1984); 5 U.S.C. 702.[6] Petitioners therefore can maintain their constitutional claim for damages against Dietrich only.

In a constitutional suit against a federal official—a *Bivens* action, see *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)—the ultimate merits of a constitutional claim are not necessarily at issue, however, because the federal official has the defense of qualified immunity available to him. Thus, the plaintiff must show that the defendant violated a "clearly established" constitutional right of which a reasonable person would have known. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); see also *Anderson* v. *Creighton*, 483 U.S. 635, 638-641 (1987).

Petitioners cannot make the required showing in this case; the constitutional right claimed by petitioners, that an applicant for government benefits can have a Fifth Amendment property interest in those benefits, was in no way "clearly established" at the time of Dietrich's action—or now, for that matter. Indeed, petitioners acknowledge that the issue is "unresolved by this Court" and has divided the lower courts. Pet. 13; see, *e.g.*, *Lyng* v. *Payne*, 476 U.S. 926, 942 (1986) ("[w]e have never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment"). In addition, the Sixth Circuit recently noted (after the decision in this case) that the issue is still an open one in that circuit. See *Harper* v.

[6] Petitioners do not challenge the court of appeals' rejection of their FTCA claim against the United States. Pet. 11 n.3.

Secretary of HHS, 978 F.2d 260, 263-264 (1992). As a result, Dietrich cannot be held liable for having violated a "clearly established" constitutional right. And the underlying constitutional issue petitioners want this Court to decide is thus not presented in this case.[7]

2. Petitioners also contend (Pet. 25-33) that "[e]ven if the Petitioners failed to meet the criteria for receiving their emergency loans, they had a constitutionally protectable right to have that issue adjudicated according to the agency's mandatory administrative hearing process." Pet. 25. For three, independent reasons, that contention is erroneous.

a. First, petitioners' argument is an attempt to transform procedures provided by the FmHA into constitutionally required procedures even though no substantive liberty or property interest of petitioners is implicated. That argument misconceives the guarantee of the Due Process Clause.

This Court's decision in *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 541 (1985), made clear that "[t]he categories of substance and procedure are distinct." Procedural rights—such as notice, a hearing, and an administrative appeal—are guaranteed by the Due Process Clause only when a substantive liberty or property interest is at stake. See *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Once it is determined that a constitutionally protected liberty or property interest is at stake, the failure to provide constitu-

[7] In any event, we disagree with petitioners that an applicant for government benefits can have a Fifth Amendment property interest in the benefits.

tionally required procedures constitutes a violation of the Due Process Clause.

Conversely, however, this Court has held that if no constitutionally protected liberty or property interest is implicated, the claimant cannot raise a *constitutional* objection to the procedures used in the claimant's case—even if the government does not follow its own procedures. See *United States* v. *Caceres*, 440 U.S. 741, 751-752 (1979). As the Court has recognized, "an expectation of receiving process" alone does not trigger the protection of the Due Process Clause. *Olim* v. *Wakinekona*, 461 U.S. 238, 250 n.12 (1983); see also *Hewitt* v. *Helms*, 459 U.S. 460, 471 (1983) ("careful procedural structure" regarding prison confinement is insufficient to create due process protection). That is because the purpose of the Due Process Clause is "to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Olim*, 461 U.S. at 250. The government "may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, but in making that choice the [government] does not create an independent substantive right." *Id.* at 250-251 (footnote omitted).[8] In sum, because petitioners have not been deprived of a substantive interest that is constitutionally protected, petitioners cannot raise a *constitutional* objection to the procedures used in their case.

[8] Petitioners' argument would mean that a constitutional violation would occur each time an agency's procedures were not followed. This Court has previously rejected that result as inconsistent with the requirements of the Due Process Clause. See *Hewitt* v. *Helms*, 459 U.S. at 471.

This Court's decision in *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), is not to the contrary. That case held that a cause of action to redress employment discrimination—like other causes of action authorizing monetary and equitable redress —represents a constitutionally protected property interest. The Court thus determined that certain procedures were constitutionally required before that interest could be terminated. See *id.* at 433-437. That case does not support the novel proposition suggested by petitioner: that the existence of agency procedures means that any departure from those procedures is necessarily a violation of the Due Process Clause. See *Loudermill*, 470 U.S. at 538-541.

b. Second, even if there were a constitutional requirement that an agency follow certain procedures even when no substantive liberty or property interest is at stake, that right surely is not "clearly established." The only case on which petitioners rely for their theory is *Logan*, and as explained above, *Logan* does not support petitioners' claim. Because such a right is not clearly established, Dietrich may not be held liable for damages. *Harlow* v. *Fitzgerald*, 457 U.S. at 818; see also *Anderson* v. *Creighton*, 483 U.S. at 638-641.[9]

c. Third, the court of appeals recognized, and petitioners apparently concede (Pet. 29), that "[i]t is well-established that due process is simply not implicated by a negligent act of an official causing

[9] As with petitioners' first procedural due process claim, petitioners can maintain their constitutional claim for damages against Dietrich only, and not against the United States. See pp. 7-8, *supra*.

unintended loss of or injury to life, liberty or property." Pet. App. 7 (internal quotation marks omitted; emphasis omitted); see *Daniels* v. *Williams*, 474 U.S. 327, 328 (1986). Petitioners allege that Dietrich's failure to give petitioners notice of their right to an administrative appeal was negligent; as the court of appeals noted, petitioners "fail[] to even allege gross negligence." Pet. App. 8a. The court of appeals further stated that "the record [does not] contain any evidence that would support" a gross negligence allegation. *Ibid.* As a result, petitioners cannot maintain a due process action against Dietrich for his alleged failure to give petitioners notice of their right to an administrative appeal—even if petitioners had a clearly established constitutional right to such notice.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] Petitioners complain (Pet. 29-33) that the court of appeals misread petitioners' complaint and the evidence in the record, but that fact-bound issue does not warrant this Court's review.